Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October term, 1978

No. 78-578

IN RE JOSEPH STEINBERGER, Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF MAINE

JOSEPH STEINBERGER
Waldoboro, Maine 04572
Petitioner

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IN RE JOSEPH STEINBERGER, Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF MAINE

The petitioner Joseph Steinberger respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Judicial Court of Maine entered in this proceeding on July 10, 1978.

OPINION BELOW

The opinion of the Supreme Judicial Court of Maine is reported as In re Joseph Steinberger, 387 A. 2d 1121. It appears in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Judicial Court of Maine was entered on July 10, 1978. A timely petition for reconsideration was denied on

August 15, 1978 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether a closing argument by counsel in the course of a trial asking the jury in the name of decency to give the plaintiff nothing is conduct protected by the 5th, 6th, 7th, and 14th amendments.

2. Whether a procedure on appeal of a summary contempt conviction meets due process requirements of the 5th and 14th Amendments where the reviewing court relies upon the trial judge's characterization of petitioner's manner as "insulting."

CONSTITUTIONAL PROVISIONS INVOLVED

1. That part of the 5th Amendment which provides:

> No person . . . shall be deprived of life, liberty, or property, without due process of law . . .

2. That part of the 6th Amendment which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defence.

3. That part of the 7th Amendment which provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . .

4. That part of the 14th Amendment which provides:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

On June 14, 1977 during the course of a trial in which he served as counsel for the defendants, petitioner ended his closing argument to the jury with the following statement:

> You'll have to bring a verdict for the plaintiff, but I hope you will strike a blow for the jury system and for decency by coming in with a verdict for nothing. (transcript, Appendix D14)

After rebuttal argument by plaintiff's counsel, the presiding justice excused the jury and the following exchange took place:

> THE COURT: I consider you remark contemptuous of the Court, Mr. Steinberger, when you implied that this Court is less than decent or that we engage in indecency when the Court rules as it has ruled.
>
> MR. STEINBERGER: Your Honor, I'm sorry.

> THE COURT: And I hold you in contempt of this Court for having made that remark to the jury in the process of your argument and I will determine what disposition to make of the contempt proceedings after the jury has reached a verdict. Bring back the jury. (transcript, App. D16)

There was no further discussion of the matter that day other than to continue sentencing to a later date.

On June 24, 1977 the presiding Justice filed his certified order of contempt (Certificate) which is appended to this petition as Appendix A.

The Certificate cites petitioner's closing statement to the jury, then interprets it, saying the language "was contemptuous," that it "could only be interpreted as a criticism that the presiding Justice was indecent." The Certificate also mentions a question which petitioner had asked the Court prior to closing argument:

> Is my understanding correct, your Honor, that the jury is not to be permitted to bring a verdict for the Defendant in this case, but may only bring a verdict for the Plaintiff? (transcript, App. D12)

The Certificate asserts that petitioner was "well aware" of the answer to this question and that it was "only meant to embarrass the Court." The Certificate concludes by saying that " . . . the general demeanor of counsel throughout the trial was contemptuous of the Court and its process, insulting to the presiding Justice, and

held the Court up to ridicule."

No statement of facts supportive of any of these conclusions is presented in the Certificate. Neither is there any support for these conclusions in the transcript of the proceedings on June 14, 1977. This transcript, complete through the citation for contempt, is included in this petition as Appendix D.

On July 20, 1977 a sentencing hearing was held at which petitioner was fined $500.00. Petitioner filed a timely appeal with the Maine Supreme Judicial Court.

In his appeal, petitioner raised two grounds for reversal of his contempt judgment, both of which are cited in the opinion of the Court below: (1) "that the Certificate of the presiding Justice is fatally deficient in its statement of the requisite basic facts" and (2) "that as a matter of law his conduct was not contemptuous" citing In re McConnell, 370 US 230. In its opinion the Supreme Judicial Court of Maine conceded that "To meet constitutional requirements of due process of law the certificate of the presiding Justice must provide an adequate record of the facts underlying a summary adjudication of contempt." The Maine Court held, however, that the presiding Justice's characterization of petitioner's closing remarks to the jury, delivered in

this "insulting" manner, obstructed the orderly administration of justice. The opinion of the Maine Supreme Judicial Court is appended to this petition as Appendix B.

REASONS FOR GRANTING THE WRIT

1. IMPORTANT QUESTIONS PRESENTED BY THIS CASE HAVE BEEN RESOLVED BY THE COURT BELOW IN A MANNER WHICH CONFLICTS WITH THE DECISIONS OF THIS COURT.

The first question presented by this petition is whether a plea to the jury in the name of decency is constitutionally protected conduct. The court below answers no. It held that an argument to the jury may be summarily punished as contempt where it is capable of being interpreted as an attempt to get the jury to "manifest disapproval of the Justice's denying the jury opportunity to decide whether defentdants should be found liable to plaintiff."

This Court has ruled that before the drastic procedures of the summary contempt power may be invoked to replace the protections of ordinary constitutional procedures, there must be an actual obstruction of justice which must be clearly shown by the record. In re McConnell, 370 U.S. 378 (1919). This is a fundamental due process principle and applies to state court pro-

ceedings. Holt v. Virginia, 381 U.S. 131 (1965). The court below appears to acknowledge this. Though the Certificate of the trial Judge never mentions obstruction of justice or says that petitioner in any way impeded the conduct of the trial, the court below found that "the instant certificate may reasonably by taken as stating that defendant had obstructed the presiding Justice in the discharge of his judicial functions, and such finding was justified."

Was it what petitioner said or the way he said it that constituted the obstruction of justice? The court below did not assert that the cited words were, in themselves, contempt. The certificate of the trial Judge did not make this assertion. Such a holding would clearly be contrary to this Court's holdings in Holt v. Virginia and In re McConnell, supra, particularly in light of the fact that actual intent to obstruct justice is a necessary element of contempt. Panico v. United States, 375 U.S. 29 (1963); In re Watts, 190 U.S. 1 (1903).

The manner and tone of voice in which the words were spoken clearly played a part in the lower court's determination that petitioner had obstructed justice. Indeed, the court below found that the trial Judge's characterization of petitioner's manner and tone of voice was "help-

ful" to its determination. But the only record of petitioner's demeanor which the court below had to rely upon was the assertion in the Certificate that petitioner's manner and tone of voice were "insulting to the Court and represented a challenge to the integrity of the Court."

This Court has said clearly that such conclusions are not statements of fact upon which meaningful review can be based. In re McConnell, supra. The court below attempts to distinguish this case on the ground that these characterizations are here only "one aspect of a larger matrix of circumstances, including the specific words spoken by the defendant." It is one aspect, perhaps, but an essential one. What sort of review is possible if an essential element of the cited contempt is described in the record only by the trial Judge's assertion that he was insulted? It is not an adequate review under due process requirements of the Constitution. In re McConnell, 370 U.S. 230; Holt v. Virginia, 381 U.S. 131.

2. IMPORTANT RIGHTS OF ALL CITIZENS ARE AFFECTED BY THIS CASE.

The right of all citizens to trial by jury and to the assistance of counsel is threatened where due process standards are not met in sum-

mary contempt proceedings or where contempt is too vaguely or broadly defined. The instant case raises this issue most dramatically. The conduct cited as contempt is petitioner's final argument to the jury. Petitioner asked the jury, in the name of decency, to give the plaintiff nothing. This cannot be said to be anything more or less than a vigorous and honest effort on the part of counsel to protect his client's interests and to advocate their cause. To allow counsel to be punished for such conduct would be to undermine the rights of all citizens to due process and to a fair trial. Holt v. Virginia, 381 U.S. 131, In re McConnell, 370 U.S. 230, In re Watts, 190 U.S. 1.

3. SUMMARY CONTEMPT MATTERS BY THEIR NATURE MERIT SPECIAL ATTENTION BY THIS COURT.

Matters involving contempt of court go to the core of the judicial process in that they relate to the control and limitation of the judiciary itself. In the instant case it is clear from the Certificate and from the transcript that the trial Judge had a great personal stake in the outcome of petitioner's appeal to the Supreme Judicial Court of Maine. A decision such as the decision of the court below inevitably raises, in the minds of citizens in gener-

al and lawyers in particular, questions about the willingness of the judiciary to police itself effectively.

If lawyers fear that they will not have meaningful review of an arbitrary contempt citation, the vitality and independence of the bar are threatened. Perhaps even more important, genuine respect for the judiciary and for our legal system is undermined.

This court has often expressed its concern for the potential for harm to the judicial system from abuse of the contempt power. See, e.g., Ex parte Hudgings, 249 U.S. 378 (1919); Nye v. United States, 313 U.S. 33 (1941); Bridges v. California, 314 U.S. 252 (1941); In re McConnell, 370 U.S. 230 (1962); Holt v. Virginia, 381 U.S. 131 (1965).

In its decision in Sacher v. United States, 343 U.S. 9, a decision in which a contempt conviction was upheld, this court said:

> But that there be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous, and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever.

4. MANDATORY REVIEW WOULD BE AVAILABLE TO PETITIONER BUT FOR THE FACT THAT THE

CRIME FOR WHICH HE IS CONVICTED IS NOT DEFINED BY STATUTE.

If the crime for which petitioner stands convicted were defined by statute, and if its definition were as vague as the Maine case law definition is, petitioner would have been in a position to question the statute's constitutionality on the grounds of this vagueness. In that case petitioner would have been entitled to review by this court under 28 U.S.C. 1257(2). If mandatory review is appropriate in that case, review should be granted here. In the instant case petitioner has had to wait for the decision of the court below in order to find out what standard of contempt his conduct would be measured by. It turns out that that definition is too broad and vague to meet due process requirements of the constitution. The importance of review by this court is here at least as great as it would be if there were an overly broad or vague statute defining contempt.

Respectfully submitted,

Joseph Steinberger
Waldoboro, Maine 04572
Petitioner

APPENDIX A

STATE OF MAINE
Lincoln, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-77-69

IN THE MATTER OF JOSEPH STEINBERGER, Esq.

DEFENDANT IN CONTEMPT

CERTIFICATE

On June 14, 1977 in the County of Lincoln, the case of Harold C. Ralph vs. Rachel Lamarre, et al was presented to a jury; Dominic Cucci-nello, Esq. being counsel for the Plaintiff, Joseph Steinberger, Esq. being counsel for the Defendants, the Honorable Harold J. Rubin, Justice of the Superior Court presiding. The case involved a complaint seeking to recover on a deficiency remaining on a contract cover-ing the sale of a trailer where there had been a repossession of the trailer, and it was sold after public and private notice for an amount less than the oustanding balance remaining on the contract. The Defendants countered with a counterclaim seeking statutory damages for fail-ure to act in good faith and also defending on

the ground that the Plaintiff failed to obtain true value or fair value for the house trailer at the time of the sale following the repossession.

At the conclusion of the testimony and evi-dence offered by both the Plaintiff and Defend-ants, the Plaintiff moved for a directed verdict for the Plaintiff on his complaint as well as a directed verdict for the Plaintiff on the De-fendants' counterclaim. The Court granted the Plaintiff's motion for a directed verdict for the Plaintiff on the Defendants' counterclaim, and granted the Plaintiff's motion for a direct-ed verdict on the complaint to the extent that the Court limit the issue for the jury to the value of the trailer at the time it was sold following repossession. The Court announced its decision on the Plaintiff's motions to coun-sel in chambers just prior to convening of the Court after lunch.

Plaintiff's counsel made his closing statement to the jury and then Mr. Steinberger as counsel for the Defendants rose to address the jury. Prior to speaking to the jury, he turned to the Court and in the presence of the jury made the following statement:

> "MR. STEINBERGER: Is my understanding correct, your Honor, that the jury is not to be permitted to bring a verdict for the

Defendant in this case but may only bring a verdict for the Plaintiff?

"THE COURT: That's right."

Mr. Steinberger continued to address the jury and in closing to the jury made the following statement:

"MR. STEINBERGER: So, there you have it. You'll have to bring a verdict for the Plaintiff, but I hope that you will strike a blow for the jury system and for decency by coming in with a verdict for nothing. Thank you very much."

The language used by Mr. Steinberger in making this statement was contemptuous of this Court and demeaning to the dignity of the Court for it could only be interpreted as a criticism that the presiding Justice was indecent when he granted the motions of the Plaintiff preventing the Defendants from having the jury find a verdict for them in their counterclaim. The manner in which the words were spoken, the tone of voice, were insulting to the Court and represented a challenge to the integrity of the Court. Mr. Steinberger, by his earlier remark in the presence of the jury, wherein he expressed his bewilderment at the fact that the Court had granted the Plaintiff's motions, and that the Defendants were not entitled to a verdict, was

well aware of the fact that this had been the result of the Court's decision on the Plaintiff's motions, and that his statement to the Court in the presence of the jury was only meant to embarrass the Court and to insult the Court by intimating to the jury that the Court was in error in so ruling.

The conduct of counsel in the conduct of this trial, as it relates to specific items as set forth herein as well as the general demeanor of counsel throughout the trial was contemptuous of the Court and its process, insulting to the presiding Justice, and held the Court up to ridicule.

For all of the foregoing reasons, I find counsel for the Defendants, Joseph Steinberger, Esq. to be guilty of a direct contempt of this court committed in its presence, and I do hereby certify that all of the foregoing statements of fact are true and correct.

Dated at Wiscasset, Maine this 23rd day of June, 1977

Harold J. Rubin
JUSTICE OF THE SUPERIOR COURT

APPENDIX B

ENTERED
July 10, 1978

Reporter of Decisions
Decision No. 1763
Law Docket No. Lin-77-15

In re JOSEPH STEINBERGER

WERNICK, J.

On June 14, 1977 defendant Joseph Steinberger, duly licensed to practice law in this State, was acting as the attorney for the defendants in the jury trial of a civil action in the Superior Court (Lincoln County). During the trial, attorney Steinberger was summarily[1] adjudged guilty of contempt of court. He has appealed from that judgment.

We deny that appeal.

The certificate of the presiding justice narrates these circumstances. The action on trial pertained to a contract for the sale and purchase of a trailer, the trailer having been

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[1] Rule 42(a) M.R.Crim.P., provides for the summary disposition of a contempt, as follows:

> "A criminal contempt may be punished summarily if the justice certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the justice and entered of record."

repossessed and sold after an alleged default of payment. The action sought recovery for the deficiency claimed due as the outstanding unpaid balance of the purchase price. The defendants counterclaimed for statutory damages allegedly arising from the failure of the plaintiff to act in good faith. At the conclusion of all the evidence, plaintiff moved for a directed verdict for plaintiff on issues raised by the counterclaims as well as on the question of defendants' liability to plaintiff under the complaint. The presiding Justice considered plaintiff's motion and decided to grant it. Immediately after the noon recess he called counsel into chambers and told them his decision.

The trial resumed, and counsel for plaintiff then gave his closing argument to the jury. Attorney Steinberger rose to make a closing argument on behalf of the defendant. Addressing the presiding Justice, but speaking loudly enough for the jury to hear, he said:

> "Is my understanding correct, your Honor, that the jury is not to be permitted to bring a verdict for the defendant/s/ in this case but may only bring a verdict for the plaintiff?"

The presiding Justice answered that the understanding was correct. Attorney Steinberger then presented a brief closing argument to the

jury,[2] ending it with the statement:

> "So, there you have it. You'll have to bring a verdict for the plaintiff, but I hope that you will strike a blow for the jury system and for decency by coming in with a verdict for nothing. Thank you very much."

The presiding Justice thereupon asked the jury to retire to their jury room for a few minutes. He then adjudicated defendant Steinberger in contempt of court,[3] on grounds stated in

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[2] Although it is not set forth in the certificate of the presiding Justice, the record reveals that defendant began his closing argument by stating: "Well, this is kind of a sad time for me because I wanted to have you be in a position . . . ." The Court then interrupted and cautioned defendant: "The Court has ruled, Mr. Steinberger . . . and you conduct yourself in accordance with the Court's ruling."

[3] After making the contempt adjudication, the Justice had the jury brought back to the courtroom and he proceeded to instruct the jury on the civil action. In the course of the instructions the Justice gave a curative instruction as to the remarks of defendant Steinberger. After the jury returned a verdict and was discharged the Justice indicated to defendant that he would dispose of the contempt matter the following day. At defendant's requests, however, the case was continued for sentencing on two occasions. On July 20, 1977, the presiding Justice filed the contempt certificate, afforded defendant an opportunity for allocution, listened to the arguments of defendant's attorney and ordered defendant to pay a fine of $500.00.

the certificate as follows:

> "The language used by Mr. Steinberger in making this statement was contemptuous of this Court and demeaning to the dignity of the Court for it could only be interpreted as a criticism that the presiding Justice was indecent when he granted the motions of the Plaintiff preventing the Defendants from having the jury find a verdict for them in their counterclaim. The manner in which the words were spoken, the tone of voice, were insulting to the Court and represented a challenge to the integrity of the Court. Mr. Steinberger, by his earlier remark in the presence of the jury, wherein he expressed his bewilderment at the fact that the Court had granted the Plaintiff's motions, and that the Defendants were not entitled to a verdict, was well aware of the fact that this had been the result of the Court's decision on the Plaintiff's motions, and that his statement to the Court in the presence of the jury was only meant to embarrass the Court and to insult the Court by intimating to the jury that the Court was in error in so ruling."

1.

As his first point of appeal, defendant contends that the certificate of the presiding Justice is fatally deficient in its statement of the requisite basic facts.

To meet constitutional requirements of due process of law the certificate of the presiding Justice must provide an adequate record of the facts underlying a summary adjudication of contempt. Alexander v. Sharpe, Me., 245 A.2d 279

(1968). The purpose is

> "to present to a reviewing court a full and clear statement of the facts out of which the contempt arose so that that court may determine whether the action of the committing court was within the jurisdiction and whether its action was just or arbitrary." (245 A.2d 288)

In support of his attack on the sufficiency of the instant certificate, in particular relation to the certificate's mention of defendant's "manner" while speaking and his "tone of voice" as being "insulting", defendant points to various decisions holding that the certificate must recite with specificity the facts which underlie the ultimate conclusory findings on which the adjudication of contempt rests. See, e.g., Parmelee Transportation Co. v. Keeshin, 294 F.2d 310 (7th Cir. 1961); Parmelee Transportation Co. v. Keeshin, 292 F.2d 806 (7th Cir. 1961); rev'd on other grounds sub nom. In re McConnell, 370 U.S. 230, 82 S.Ct. 1288, 8 L.Ed.2d 434 (1962).

In each of these cases the certificate made a generalized conclusory statement that the manner, tone of voice and attitude of the defendant were contumacious, but gave no supporting particulars. Here, however, the certificate does not purport to assert defendant's "insulting" manner and tone of voice as such to be the contumacious conduct, but mentions it only as one aspect of

a larger matrix of circumstances, including the specific words spoken by the defendant. All of these circumstances are specifically described in the certificate as the totality constituting defendant's contumacious conduct. In such a context it is appropriate, and helpful, that the certificate characterize defendant's manner of address and tone of voice.[4] As we said in State v. Alexander, Me., 257 A.2d 778, 781 (1969):

> "The purpose of the certificate . . . is precisely to get as full a picture as words can portray of the contemptuous conduct. The stenographic record will not pick up such elements of in-court misbehavior as rude and disrespectful tone of voice or manner or address, nor the shaking of one's finger at the court in a belligerent way. The complete depiction of the courtroom scene must be left to the justice's ability to reflect the same in his certificate and its reliability must by placed on his fairness and objectivity."

The certificate sufficiently stated the par-

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[4] Defendant argues in addition that the further reference in the certificate to "the general demeanor of counsel throughout the trial" was too general and conclusory to provide a basis for appellate review. We are satisfied, however, from the other language in the certificate and the language of the presiding Justice at the time of the contempt adjudication that the reference to general demeanor was surplusage which did not play any part in the adjuducation of contempt.

ticular facts which were the basis of the contempt adjudication.

2.

In his only other point of appeal, defendant argues that as a matter of law his conduct was not contemptuous.[5] Defendant relies on language in In re McConnell, 370 U.S. 230, 236, 82 S.Ct. 1288, 8 L.Ed.2d 434 (1962), that

> ". . . arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty."

Assessing defendant's conduct by the McConnell criterion for which defendant contends, we find that the instant certificate may reasonably be taken as stating that defendant had obstructed the presiding Justice in the discharge of his judicial functions, and such finding was justified. When the Justice presiding over a trial makes a ruling, or determination, adverse to the position of counsel,

> "it is not counsel's right to resist or to insult the judge--his right is only respectfully to preserve his point for appeal.

---

[5] Defendant raises no question about the Justice's resort to summary proceedings to dispose of the contempt here at issue.

> Sacher v. United States, 343 U.S. 1, 9, 72 S.Ct. 451, 96 L.Ed. 717 (1952)

With this in mind, the presiding Justice had good reason to believe that by the totality of his conduct, as described in the certificate, defendant was asking the jury to manifest disapproval of the Justice's denying the jury opportunity to decide whether defendants should be found liable to plaintiff. Defendant Steinberger thus impeded the presiding Justice in the exercise of his judicial function, and prerogative, to have the jury accept without reservation the law as he had given it. This was an obstruction of the orderly administration of justice constituting contumacious conduct. See Alexander v. Sharpe, supra at 283, 284; cf. In re Holbrook, 133 Me. 276, 280, 177 A. 418 (1935).

The entry is:

Appeal denied.
Judgment affirmed.

APPENDIX C

STATE OF MAINE

LINCOLN, ss. SUPREME JUDICIAL COURT
Sitting as the Law Court
Law Court Docket No.
Lin-77-15

In re JOSEPH STEINBERGER) ORDER

After full consideration by the Court of the Appellant's Motion for Alteration of Facts and Reconsideration of Mandate, dated July 20, 1978, and of the State's Reply thereto dated July 27, 1978, it appearing:

1. The motion is premised upon a suggestion that the factual statement in the Court's opinion that the presiding Justice prior to oral argument had called counsel into chambers and told them his decision on plaintiff's motion for directed verdict, is not supported by the trial transcript of the case in chief; however, that factual statement is taken directly from the certificate filed by the presiding Justice pursuant to Rule 42(a), M.R.Crim.P.; and

2. In any event, the motion fails to make a case for reconsideration of the mandate since Appellant's conduct which this court found "impeded the presiding Justice in the exercise of his judicial function, and prerogative, to have the jury accept without reservation the law as he had given it" occurred only after the presiding Justice had clarified to Appellant the significance of his granting of plaintiff's motion for directed verdict;

Therefore, IT IS ORDERED AND ADJUDGED that Appellant's Motion for Alteration of Facts and Reconsideration of Mandate be and it is hereby denied.

Dated: August 15, 1978.

For the Court,

Vincent L. McKusick

Chief Justice, Supreme Judicial Court

APPENDIX D

STATE OF MAINE
Lincoln, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. 76-23

HAROLD C. RALPH, d/b/a,
Plaintiff
-vs-
RACHEL LAMARRE, et al,
Defendant

TRANSCRIPT
OF
TRIAL
(VOLUME II)

Wiscasset, Maine
June 14, 1977

BEFORE: HON. HAROLD J. RUBIN, JSC, and a jury

APPEARANCES: DOMINIC CUCCINELLO, Esq.
for the Plaintiff

JOSEPH STEINBERGER, Esq.
for the Defendant

Carla Corea
Official Court Reporter

(This trial continued from June 13, 1977.)

MR. CUCCINELLO: Your Honor, I have a couple of motions. I would like to file a motion for a directed verdict on the Defendants' counterclaim for the reasons that the Defendant did not sustain that burden of proof by any evidence showing that there was a surplus as claimed in Count I and also did not sustain their burden of proof by any evidence that the Defendants did not receive notice and that the said mobile home which was sold at a public sale or auction was not sold in a commercially reasonable manner and not in good faith. They have no evidence whatsoever to substantiate that complaint and I don't see how in any possible manner that this issue could go to the jury on this counterclaim.

THE COURT: You said you had a couple of motions. Do you have another motion?

MR. CUCCINELLO: Yes, I have a motion, your honor, for a directed verdict on the complaint for the reason that no evidence was presented to contradict the claim of the Plaintiff of the balance due by the Defendants. There was no evidence at all by the Defendants to contradict any balance due. Nothing at all. So, what could go to the jury? I say that the Court should direct a verdict on both complaint

and the counterclaim.

THE COURT: Thank you, Mr. Cuccinello. Do you wish to respond, Mr. Steinberger?

MR. STEINBERGER: Yes, I do. I'd like to see these motions. I haven't been given a copy.

THE COURT: Did you give Mr. Steinberger a copy of the motion?

MR. CUCCINELLO: No. I had a copy, your Honor. I should have.

MR. STEINBERGER: Well, first of all, as far as the burden of proof that the Defendants did not receive notice and that the mobile home was not sold in a commercially reasonable manner, I would like to point out that the burden of proving things is on the Plaintiff, not on the Defendant. Second of all, I think that the evidence raises substantial question about both those issues, about notice and about the commercial reasonableness of the sale. I point out that the notice of the sale was for a sale which was to take place on the afternoon of February 6th at 1 p.m. as shown by the exhibits which the Plaintiff has introduced and the evidence which the Plaintiff has introduced by that sale when Mr. Maynard Eugley was at the sale took place at 9:30 or 10 a.m. that morning. I would say that raises substantial question about the adequacy of notice for that sale.

I don't think that a notice of the sale at 1 p.m. is adequate notice of a sale that takes place at 9:30 or 10 in the morning. So, as far as notice is concerned, I believe there is a very serious issue. As far as commercial reasonableness is concerned, we have the testimony of Mr. Eugley about what happened at the sale and it raises -- and we also have the testimony of the woman from G.M.A.C. about how the sale was advertised and so forth. I think there is substantial questions raised about whether or not the Plaintiff made a good faith effort to sell the trailer. I don't think that the Defendant has an obligation to present evidence in direct testimony of witnesses for the defense. The testimony came on cross examination and direct examintion of witnesses for the Plaintiff which is where the Defendant's case is primarily.

THE COURT: All right, Mr. Steinberger.

MR. STEINBERGER: Your Honor, excuse me. If I might say one thing. The motion for directed verdict, that there was no evidence presented to contradict the claim of the Plaintiff of the balance due by the Defendants. First of all, this is a complaint for a deficiency, not for a balance due which is a different thing. Second of all, it is the burden of the Plaintiff to show that some balance was due on this contract

and in fact, the Plaintiff hasn't shown that there was any balance due except by a statement of a woman who said that this is what the computer showed, but she didn't know how to figure it out herself. I think that raises some question on that ground, too; but, in any case, it is not a complaint for a balance due. It is for a deficiency which is a different matter.

THE COURT: There are very few facts in dispute as far as the evidence is concerned and let me make it clear that I'm deciding the issues in this law suit based upon the presentation of the testimony in evidence before this Court from which the factfinder can reach a decision without speculation, guess, or conjecture.

It is undisputed that the Defendants in this case executed a contract with the Plaintiff for the purchase of a trailer and there was a deferred balance of $8200.28 which included the unpaid balance of the trailer home that was purchased together with the interest and insurance. It is further undisputed that the Defendants became in arrears on the payments as called for under the contract and that it is clearly the position of this Court that the -- one of the Defendants requested as shown by Plaintiff's Exhibit 2 that the General Motors Acceptance Corporation which had purchased the promissory payments in this

matter and repossessed the trailer which it did. It is undisputed that the General Motors Acceptance Corporation gave notice, gave each of these Defendants personal notice of the place and time of sale for the opportunity to be present for the purpose of protecting their interest or purchasing the property if they chose to do so. It is further undisputed that there is public notice advertised in the Kennebec Journal which is a paper of the largest circulation in the central Maine area giving public notice of the intended sale of the trailer by General Motors Acceptance Corporation. It is further undisputed that at the time of the sale or on the day of the sale, neither of the Defendants appeared and there is no evidence that they appeared at any time during the day for the purpose of bidding on the trailer or making any effort to reacquire it in any form whatsoever. There is testimony that based upon an appraisal made by an employee of the Plaintiff, the value of the trailer at that time was appraised in the sum of $2500 or between 2,000 and $2500, I believe the testimony was. The Defendants received credit on their unpaid balance to the extent of that appraisal, to wit $2500.

The Defendants offered no evidence with respect to whether or not this was a commercially reasonable processing. What other steps are

recognized or taken by those people who engage in this type of business demonstrate that the notice and procedures taken in this case were not commercially reasonable under the circumstances so that there is no standard upon which -- there is no evidence of any standard in this case upon which it could be determined that this was or was not commercially reasonable processing. Certainly, the Defendants had notice. So, we don't have a taking without notice. They had notice of the sale. They had the opportunity to be present. They had notice of the location of the sale and I take the position that the law does not require the seller in this instance to do anything other than obtain fair market value for the vehicle when sold so that there is an absence of fraud or any imposition upon the Defendants.

The Court grants the Plaintiff's motion for judgment on the count on the Defendants' counterclaim and the Clerk will enter a judgment for the Plaintiff on the Defendants' counterclaim. The Court will also grant the Plaintiff's motion for a directed verdict on the claim in chief to the extent that all the issues are resolved in favor of the Plaintiff except the Court will leave the issue of whether or not the fair market value of the trailer was obtained by the seller

at the time of the sale on February 6th, 1975. To that extent and with that limitation, the Plaintiff's motions are granted.

Will you see if the jurors are ready, please.

(Whereupon the jury returned to the courtroom.)

THE COURT: Good morning, Mr. Cuccinello, you may address the jury.

MR. CUCCINELLO: I understand, your Honor, that the sole issue now before the jury is that whether or not the sale, the public sale received that was held, that the mobile home was sold at a fair market value. Is that I understand the issue before the jury?

THE COURT: That is the only issue before the jury.

MR. CUCCINELLO: Now, so the only thing you people are going to hear right now is whether or not at the time of this sale of this trailer, mobile home, that was purchased in 1972 for $4500 plus sales tax of $225 and in its condition after two years' service by the Defendant, whether, when this public sale was held and you can only go by the evidence that you heard on this stand. You can't guess at it. You can't think of anything that wasn't presented on the stand. You have got to draw exactly what you heard on this

stand. You may not like what you heard or you may not agree with what you heard; but, you have got to go with what you heard.

Now, the evidence that you heard on this stand regarding the mobile home. She had it since September 26th, 1972 until she moved out, December 13th, 1974. So, she had been using this trailer. Now, she had two children and you know how it is when people have trailers and have children. It is not an easy situation and she told you herself the condition of the trailer when she left it. She took no provisions of taking care of it. She left it in November when winter is setting in. It was empty for November and December and on January 20th, 1977, she wrote a letter to General Motors about repossessing the car because she didn't want the responsibility of making the payments, a large payment every month. So, she left the mobile home and you heard her say that she never took any precautions at all. The only time anything was ever done about it is when you heard the testimony when Mr. Crabtree some time in the middle of january of '75 says look, something is wrong with the trailer over there. It is leaking. The water burst and so forth. So then, she comes over and she told you herself at that time she shut the water pipes off. Well, December is a little late to -- I

mean January, cold weather, and the pipes were all broken. It's pretty late to shut the water off because all the damage has been done and if you people own any property you know how much damage can be done in the winter time with frozen pipes bursting. You get your lavatory broken, cracked. Your sinks, your drains underneath, and when that can happen in the winter time, there is nobody there.

Then, you have this sale that was held and there was a public sale held and advertised in the Kennebec Journal, the widest publication. You can get to give everybody an opportunity to come to the sale if they wanted to buy a trailer. It is identified in the notice what kind of trailer it was, serial number, and everything else to give everybody an opportunity to get the best price for this trailer you can get. It is not a private sale, it is a public sale. The Defendants were given notice of the sale, the time, and place, and everything else. It was being held --

MR. STEINBERGER: I object, your Honor, to all of this. I'm being told that I can't raise these issues and I don't see how it possible for Mr. Cuccinello to now say that these things are true which we contend are not true and I won't be in any position to refute them because it is not an issue at this time.

THE COURT: The only issue as you said, Mr. Cuccinello, is the fair market value of the trailer at the time of the sale and whether or not there is evidence to support the figure that the sale brought.

MR. CUCCINELLO: Right. Now, so far as the evidence goes at the time of the sale, and you have got to take into consideration the condition of the trailer at the time it was sold. The only evidence you heard in this stand was the people who saw this trailer at the time it was sold. You heard Mr. Eugley testify to the condition of the trailer at the time it was sold; what was wrong with the trailer, what had to be done to the trailer, the damage to the trailer. Don't forget the trailer was over two years old and used by these people. What is the price of this trailer now, two years later. You people have from your own experiences the same thing when you buy a used car. What is the value of the car after two years use, abuse of the trailer. Eugley who has been in the business for 25 or 30 years in mobile homes, testified that the price of the trailer would be $2500. He didn't even want to buy the trailer he said, but for 2,000, $2500 there was nobody else there to bid on this trailer. So, the law said that you have got to get the best fair market value of

this trailer. The only testimony on the stand was the fair market value given by Mr. Eugley and you can tell from looking at him on the stand and the testimony you saw whether he is an honest fellow from his demeanor on the stand. Was he trying to convince you of something that wasn't true? Does he look honest to you? It is up to you people to decide who was telling the truth and so forth and I say to you that $2500 was the top. They gave him the top credit, not the 2,000 or anything less; but the top of $2500. I say to you that's the only evidence you have got to go by. The Defendants never offered any evidence whatsoever. You have to remember what you heard of what the fair market value was of this trailer. What else can you deliberate on? So, I say to you that the $2500 was the fair market value at that time of that trailer in its condition at that time and for the use. It had two years and so forth and that's the only issue you have right now.

THE COURT: Mr. Steinberger.

MR. STEINBERGER: Is my understanding correct, your Honor, that the jury is not to be permitted to bring a verdict for the Defendant in this case, but may only bring a verdict for the Plaintiff?

THE COURT: That's right.

MR. STEINBERGER: Well, this is kind of a sad time for me because I wanted to have you be in a position --

THE COURT: The Court has ruled, Mr. Steinberger.

MR. STEINBERGER: Excuse me.

THE COURT: And you conduct yourself in accordance with the Court's ruling.

MR. STEINBERGER: You're going to be directed to find a verdict for Mr. Ralph. However, you do have a choice in this case because you must determine how much he is to receive and you may decide that he is to receive the amount which he asks for which is $1,799 or you may find that he is to receive nothing.

The issue which is now before you is the question of what was the fair market value of the trailer at the time when it was sold. The Plaintiff claims that the fair market value of that trailer was $2500 based on the appraisal which was given by a man who was working for him for a number of years. You are being told that you're supposed to accept this figure and that there isn't any other evidence that you have about the market value of that trailer; but, you did hear of the fact which is that the trailer was sold about three or four months later by Harold Ralph for $4,300 and I think that --

MR. CUCCINELLO: I object to that line of --

THE COURT: It is perfectly proper. That's evidence before the jury to consider.

MR. CUCCINELLO: All right.

MR. STEINBERGER: There was also testimony that the trailer was in bad shape and that repairs were needed to the trailer that cost a certain amount of money. I point out that there is dispute about this question of what the condition of the trailer was. You not only have the testimony of Mr. Eugley and Mr. Ralph, but you also have the testimony of Mrs. Lamarre and I suggest that if you think about what people look like and how people act, that she didn't seem like a person who wasn't telling the truth. As far as the amount that was spent on these repairs, remember that you don't have any bills. You don't have anything to back up this contention that 1600 or $1300 was spent on repairs to the trailer. All you have is this bald statement by another employee of Harold Ralph that this work was required and you are in a position to believe that or disbelieve that as you want.

So, there you have it. You'll have to bring a verdict for the Plaintiff, but I hope that you will strike a blow for the jury system and for decency by coming in with a verdict for nothing. Thank you very much.

MR. CUCCINELLO: I'm sure the Judge is going to instruct you upon no sympathy on either side. This is not a case for sympathy on either side. This is a contract matter, damages, and so forth; but, sympathy has no part in this courtroom. I'm sure that you are all reasonable, intelligent people to realize that.

Now, he says that you should bring in a total amount of whatever the complaint was, 17 or nothing. That's not correct. You know that from the testimony on this stand yourselves that Harold Ralph spent over $1300 on repairing this trailer to put it in the condition it was sold later on for 4300. So, you have got that in your mind. Another thing in your mind is whether the evidence on here contradicts the fair market value that was testified to by Mr. Eugley or contradicts any of the work and repairs that was done to that trailer to put it in the condition so it could be sold for $4300. You have got to go on exactly what the evidence that you heard and I know that you people are going to be reasonable and are going to do the right thing. Thank you.

THE COURT: The jury will retire to the jury room for a few minutes.

(Whereupon the jury retired to the jury room.)

MR. STEINBERGER: Your Honor, if I might please --

THE COURT: Just a moment. The reporter will read back to the Court the last two sentences, I believe, of Mr. Steinberger's closing statement to the jury.

(The following was read back by the reporter:)

"You'll have to bring a verdict for the Plaintiff but I hope that you will strike a blow for the jury system and for decency by coming in with a verdict for nothing. Thank , u very much."

THE COURT: I consider your remark contemptuous of this Court, Mr. Steinberger, when you implied that this Court is less than decent or that we engage in indecency when the Court rules as it has ruled --

MR. STEINBERGER: Your Honor, I'm sorry.

THE COURT: And I hold you in contempt of this Court for having made that remark to the jury in the process of your argument and I will determine what disposition to make of the contempt proceedings after the jury has reached a verdict. Bring back the jury.

(Whereupon the jury returned to the courtroom.)

THE COURT: Mr. Foreman, ladies and gentlemen of the jury, will you please rise...

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-578

JOSEPH STEINBERGER,
Petitioner

v.

STATE OF MAINE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF THE
STATE OF MAINE

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Judicial Court of Maine (App. B of Petition) affirming the conviction of the Petitioner

of criminal contempt is reported as In re Joseph Steinberger, 387 A.2d 1121 (Me. 1978).

JURISDICTION

The judgment of the Supreme Judicial Court of Maine was entered on July 10, 1978, and the court's mandate was issued on the same day. Petitioner filed on July 25, 1978 a "Motion for Alteration of Facts and Reconsideration of Mandate" which was denied by written order of the Supreme Judicial Court of Maine dated August 15, 1978.[1] Petitioner filed his Petition in this Court on October 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

1. Although ostensibly barred on jurisdictional grounds, see Ginn v. Penobscot Co., 342 A.2d 270 (Me. 1975), motions for "rehearing" or "reconsideration of mandate" have been entertained by Maine's Supreme Judicial Court. See, e.g., Nadeau v. State, 247 A.2d 113 (Me. 1968). However, no Maine statute or rule of court expressly authorizes a party to bring, or the court to entertain, such a motion, nor is there any limitation on the time for filing such a motion. It is unnecessary to determine the effect of the filing of the motion on the timeliness of the Petition inasmuch as the Petition was filed within ninety days of the entry of judgment. See Sup. Ct. R. 22(1).

QUESTIONS PRESENTED

1. DOES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BAR AN ADJUDICATION OF CONTEMPT OF AN ATTORNEY WHOSE LANGUAGE, ALTHOUGH NOT CONTEMPTUOUS ON ITS FACE, RESULTED IN AN OBSTRUCTION OF JUSTICE?

2. WAS THE TOTAL RECORD CONCERNING PETITIONER'S CONDUCT AND ITS EFFECT ON THE TRIAL SO INADEQUATE AS TO PRECLUDE APPELLATE REVIEW OF THE CONTEMPT ADJUDICATION AND THEREFORE DEPRIVE PETITIONER OF HIS FOURTEENTH AMENDMENT RIGHT OF DUE PROCESS?

CONSTITUTIONAL PROVISION

Constitution of the United States, Amendment XIV, Section 1:

> "...[N]or shall any State deprive any person of life, liberty, or property, without due process of law... ."

STATEMENT OF THE CASE

On June 14, 1977 Petitioner, a member of the bar of the State of Maine, was representing the defendants in a civil jury trial. After all the evidence had been presented, the presiding justice granted the plaintiff's motion for a directed verdict on the question of the defendants' liability under the complaint. Before beginning his closing argument and after plaintiff's counsel had obtained a clarification of the justice's ruling (App. D of Petition, p. 8), Petitioner turned to the justice and in the presence of the jury said:

> "Is my understanding correct, your Honor, that the jury is not to be permitted to bring a verdict for the Defendant [sic] in this case, but may only bring a verdict for the Plaintiff?"

In his certificate filed pursuant to M.R.Crim.P. 42(a) the justice stated that Petitioner's query was uttered in "bewilderment" and "intimat[ed] to the jury that the Court was in error in so ruling." (App. A of Petition, pp. 3,4). After the justice had responded to Petitioner in the affirmative, Petitioner said to the jury, "Well, this is kind of a sad time for me because I wanted to have you be in a position --." (App. D of Petition, p. 13). At this point the justice interrupted Petitioner and expressly warned him that it would be inappropriate to act in a manner inconsistent with the court's ruling. Petitioner then proceeded with his argument, concluding it with the statement:

> "So, there you have it. You'll have to bring a verdict for the Plaintiff, but I hope that you

> will strike a blow for the jury system and for decency by coming in with a verdict for nothing. Thank you very much."

In his certificate the justice described Petitioner's manner and tone in making this statement as "insulting" and "represent[ing] a challenge to the integrity of the Court" and explained that the statement "could only be interpreted as a criticism that the presiding Justice was indecent when he granted the motions of the Plaintiff... ." (App. A of Petition, p. 3).

After a brief rebuttal argument by plaintiff's counsel, the justice asked the jury to retire to the jury room for a few minutes. He then adjudicated Petitioner guilty of contempt on the grounds set forth in the certificate. The justice ordered the jury brought back to the courtroom and, in the course of his instructions relative to the civil action, gave a curative instruction as to the remarks of

Petitioner. (App. B of Petition, p. 3). At a subsequent hearing on sentencing, the justice, after affording Petitioner an opportunity for allocution, ordered him to pay a fine of $500.00.

On direct appeal to the Maine Supreme Judicial Court, Petitioner challenged the contempt finding on two grounds: first, that the certificate failed to set forth sufficient facts to permit appellate review, and second, that his conduct did not constitute criminal contempt. In denying Petitioner's appeal, the Maine court found the presiding justice's certificate to be adequate and determined that the justice had "good reason to believe that by the totality of his conduct... [Petitioner] was asking the jury to manifest disapproval of the Justice's [ruling]." The court concluded that Petitioner "thus impeded the presiding Justice in the exercise of

his judicial function, and prerogative, to have the jury accept without reservation the law as he had given it" and that this "was an obstruction of the orderly administration of justice constituting contumacious conduct." (App. B of Petition, p. 8).

ARGUMENT

I. WITH THE POSSIBLE EXCEPTION OF PETITIONER'S CLAIM AS TO THE SUFFICIENCY OF THE JUSTICE'S CERTIFICATE, A FEDERAL QUESTION WAS NEVER RAISED IN THE STATE COURT.

In his direct appeal to the Supreme Judicial Court of Maine, Petitioner raised but two issues: (1) whether the facts set forth by the presiding justice in his certificate were recited with sufficient particularity, as required by M.R.Crim.P. 42(a), to enable an appellate court to make an informed review; and (2) whether his conduct in fact constituted contempt.

Petitioner neither cited a particular constitutional provision nor made a general

reference to "the constitution" in support of his state court argument attacking the specificity of the recitation of facts in the justice's certificate. Nevertheless, because the requirement of specification in M.R.Crim.P. 42(a) is based upon the constitutional requirement of due process, Alexander v. Sharpe, 245 A.2d 279, 288 (Me. 1968), it would appear that Petitioner's appellate contention might be judicially construed as an assertion that the lack of particularization in the certificate denied him due process. Although the Maine court has not expressly indicated whether its holding in Alexander v. Sharpe, supra, is based upon the state or federal constitution, its continued construction of the due process clauses of the two constitutions as identical and coextensive in similar circumstances, see, e.g., Green v. State, 247 A.2d 117, 119 (Me. 1968), indicates that at least tacitly the Maine court in

Alexander held the certification requirement of M.R.Crim.P. 42(a) to be mandated by the Due Process Clause of the Fourteenth Amendment. Therefore, it would appear that a decision of a Maine court determining the adequacy of a contempt certificate would be based, at least partially, on federal constitutional grounds. However, even if this Court has jurisdiction to examine the issue, the exercise of that jurisdiction is not warranted for the reasons set forth in Arguments II, III and IV of this Brief.

In advancing his second argument before the Maine Supreme Judicial Court, Petitioner claimed no federal (or state) constitutional deprivation, but argued only that his conduct did not satisfy the elements of criminal contempt as that offense is defined by the common law of Maine.[2] Although it is true,

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2. Contempt has been defined in Maine as "'any act which is calculated to embarass, hinder, or obstruct the court in the administration of justice or to lessen its authority or dignity',... '[c]onduct as tends to bring

as Petitioner asserts (Petition, p. 5), that he cited In re McConnell, 370 U.S. 230 (1962), in his brief submitted to Maine's highest court, he cited that decision to support his proposition that the summary contempt power must be exercised with caution and for the benefit of that opinion's dicta regarding the great latitude which must be afforded attorneys in the area of vigorous advocacy. Before Maine's highest court Petitioner did nothing more than recite Maine's definition of criminal contempt, apply that definition to the facts of his case, and (urging that the court exercise the same caution the United States Supreme Court had urged upon the federal courts in In re McConnell, supra) argue that his

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the authority of the court and the administration of the law into disrespect or to defeat, impair, or prejudice the rights of witnesses or parties to pending litigation'... [or] '[t]o obstruct the administration of justice.'..." In re Holbrook, 133 Me. 276, 280, 177 A. 418, 420 (1935) (citations omitted); accord, Stern v. Chandler, 153 Me. 62, 66, 134 A.2d 550, 553 (1957).

conduct was not a contempt under Maine law. Petitioner never cited any constitutional provision, federal or state, or made reference to any constitutional deprivation. Because Petitioner never presented a federal question to the Maine Supreme Judicial Court relative to the sufficiency of the evidence to support a contempt finding, either in his direct appeal or in his subsequently filed "Motion for Alteration of Facts and Reconsideration of Mandate," this Court is without jurisdiction to entertain the first of the two questions presented by Petitioner (Petition, p. 2). 28 U.S.C. §1257(3); see, e.g., Cardinale v. Louisiana, 394 U.S. 437 (1969).

Furthermore, to the extent that Petitioner may be claiming that a specific intent to obstruct justice is an essential ingredient of a state contempt conviction pursuant to the Due Process Clause of the Fourteenth Amendment (Petition, p. 7), and that he was denied due process in the Maine courts be-

cause such specific intent was not established, this Court is without jurisdiction to entertain the issue because it was never raised before the Maine Supreme Judicial Court. Id. Additionally, Respondent submits that if on the basis of the language appearing on pages 10-11 of the Petition, Petitioner is seeking to have this Court decide whether Maine's definition of contempt is "too broad and vague" to satisfy federal due process requirements, this Court would be without jurisdiction to entertain the issue since it was never raised in the state court proceedings. Id.

II. THE DECISION OF THE STATE COURT IS CORRECT.

The Maine court's ruling as to the sufficiency of the certificate filed pursuant to M.R.Crim.P. 42(a) was manifestly correct. The certificate identified the particular conduct of Petitioner which formed the basis of the contempt. It quoted precisely the

language used by Petitioner and described the tone and manner in which the language was expressed. The certificate both identified the conduct constituting the contempt and explained its contumacious tendency. Cf., e.g., In re Williams, 509 F.2d 949, 959 (2d Cir. 1975); United States v. Schrimsher, 493 F.2d 842, 845 (5th Cir. 1974). The specificity of the facts recited in the certificate, conjoined with the evidence in the trial transcript of the consequent interruptions in the trial and the justice's curative instruction, provided a legally adequate basis for appellate review.

Petitioner attacks the decision of the Maine Supreme Judicial Court as to whether his conduct constituted contempt by isolating one statement made by him - his request that the jury "strike a blow for the jury system and for decency by coming in with a verdict for nothing" - and contending that because this statement did not result in an actual

obstruction of justice, the contempt adjudication denied him due process. The Maine court, however, properly assessed the totality of Petitioner's conduct as set forth in the contempt certificate, and its consequent effect on the trial, in deciding that his conduct resulted in an obstruction of the orderly administration of justice. The evidence amply supported the court's conclusion. Petitioner's initial reaction of "bewilderment" to the presiding justice's ruling, together with the remark made immediately thereafter to the jury that the ruling made it a "sad time" for Petitioner, resulted in an interruption in the trial brought about by the need to admonish Petitioner to act in accordance with the ruling. Petitioner was then expressly warned by the justice to discontinue his insinuative attack upon the court's ruling. His request that the jury "strike a blow for the jury system and for decency" then resulted in an additional interruption as the jury

was excused from the courtroom and Petitioner adjudicated guilty of contempt. Finally, the justice was compelled to give the jury a curative instructive in an attempt to amelioriate the prejudicial impact of Petitioner's conduct. In view of the actual disruptions in the trial and the potential prejudice to the plaintiff in the civil action caused by Petitioner's conduct, and in light of the express admonition given Petitioner, the Maine Supreme Judicial Court correctly concluded that the record before it supported the contempt finding.

III. THE DECISION OF THE STATE COURT DOES NOT CONFLICT WITH THE HOLDINGS OF THIS COURT.

Petitioner apparently attempts to establish a conflict between the decisions of this Court and the state court decision below by asserting that the decisions of this Court have construed the Due Process Clause of the Fourteenth Amendment to

require the States to include as elements of criminal contempt both "an actual obstruction of justice" (Petition, pp. 6-7) and a specific "intent to obstruct justice" (Petition, p. 7), and by then concluding that the Maine Supreme Judicial Court failed to apply these two elements in assessing the contumacious character of Petitioner's conduct.

Assuming, arguendo, that the Fourteenth Amendment demands that states require an obstruction of justice before adjudicating a person guilty of contempt,[3] the decision

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3. In Holt v. Virginia, 381 U.S. 131 (1965), cited by Petitioner, this Court expressly declined to pass on the question whether the summary convictions of the attorney-contemnors were invalid because their alleged misconduct did not disturb the court's business or threaten demoralization of its authority. Id. at 135-36 n.2. Respondent submits that the requirement of an obstruction of justice, albeit imposed upon the federal courts by 18 U.S.C. §401, is not a constitutionally compelled predicate for a contempt adjudication by a state court. See In re Buckley, 10 Cal.3d 237, 251-55, 514 P.2d 1201, 1210-13, 110 Cal.Rptr. 121, 130-33 (1973), cert. denied, 418 U.S. 910 (1974).

of the court below is wholly consonant with that requirement. The Maine court expressly applied to Petitioner's conduct the standard enunciated by this Court in In re McConnell, 370 U.S. 230, 236 (1962) ("an obstruction which blocks the judge in the performance of his judicial duty"). (App. B of Petition, p. 7). The court concluded that his conduct "was an obstruction of the orderly administration of justice constituting contumacious conduct." (App. B of Petition, p. 8).

With respect to Petitioner's assertion that a specific intent to obstruct justice is mandated by the Fourteenth Amendment as an element of state definitions of contempt, Respondent submits that this Court has never imposed upon the states such a rule. The two cases cited by Petitioner in support of this proposition, Panico v. United States, 375 U.S. 29 (1963), and In re Watts, 190 U.S. 1 (1903), lend no support to his assertion. Because the mens rea element Petitioner advances has never been consti-

tutionally required of the states by this Court, the decision of the Maine court does not conflict with decisions of this Court. Moreover, Respondent reiterates that an issue concerning a constitutionally mandated element as to mens rea was never raised in the Maine court.

IV. A SUBSTANTIAL FEDERAL QUESTION IS NOT PRESENTED.

The Maine Supreme Judicial Court held that the justice's certificate was sufficient to permit appellate review and that Petitioner's conduct constituted a contempt under Maine law. In view of the Maine court's manifest recognition of the due process basis of the requirement that the certificate recite the pertinent facts with particularity (App. B of Petition, p. 4), the court's decision as to the adequacy of the certificate was a purely factual one limited to the circumstances of Petitioner's case. Similarly, the issue as to whether Defendant's conduct constituted a contempt required a

determination which was purely one of fact. Neither holding of the court involved the determination of a significant constitutional issue likely to have a substantial impact upon Maine attorneys or Maine litigants. The Maine court did not promulgate new rules of constitutional law, nor did it reject or alter established constitutional rules relating to contempt. Indeed, as pointed out in Argument I, supra, Petitioner never asked Maine's highest court to apply federal constitutional principles to the contempt adjudication. The holding of the Maine court was confined to the peculiar facts before it. Consequently, the exercise of this Court's discretionary jurisdiction is not warranted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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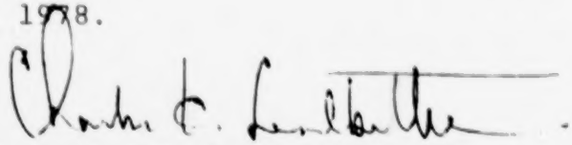
Of Counsel

CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the Rules of the Supreme Court of the United States, the undersigned, counsel of record for the Respondent, on the date written below, did deposit three copies of the above "Brief for Respondent in Opposition" in the United States Mail in Augusta, Maine, first class postage prepaid, addressed to Petitioner as follows:

Joseph Steinberger
Waldoboro, Maine 04572

Dated at Augusta, Maine, this 31st day of October, 1978.



CHARLES K. LEADBETTER
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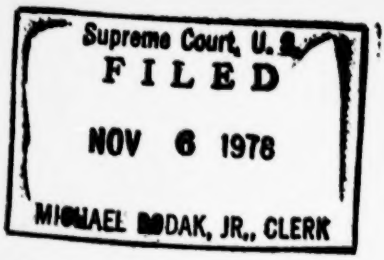

IN THE

SUPREME COURT OF THE UNITED STATES

October term, 1978

No. 78-578

IN RE JOSEPH STEINBERGER

ON PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME JUDICIAL COURT OF MAINE

PETITIONER'S REPLY MEMORANDUM

JOSEPH STEINBERGER
Waldoboro
Maine
Petitioner

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I.

Respondent admits that the Court below determined the adequacy of the Certificate on federal constitutional grounds under the due process clause. (Respondent's brief p. 10). But he then argues that Petitioner "... never

presented a federal question to the Maine Supreme Judicial Court relative to the sufficiency of the evidence to support a contempt finding ... " and that therefore this Court is without jurisdiction. (Resp. p. 12)

Petitioner raised the sufficiency issue when he claimed in his brief to the Court below "that the Certificate... is fatally deficient in its statement of the requisite basic facts." (Petition p. 5) The whole tenor of this argument involves the federal due process problem. The Court below recognized this in its opinion and discussed the issue in due process terms. (Pet. p. B-4,5) This question was essentially involved and was necessarily passed upon. This Court has ruled that in such a case the rights involved need not have been "expressly asserted below" for jurisdiction to exist. Manhattan Life Ins. Co. v. Cohen 234 US 123, 134 (1913) In fact this Court has said : "There can be no question as to the proper presentation of a federal claim when the highest state court passes upon it." Raley v. Ohio 360 US 423,

436 (1959). See also Ocala Star-Banner Co. et al v. Damron 401 US 295, 299 (1971) and Food Employees v. Logan Plaza 391 US 308, 334 (1967), Harlan, J. dissenting on other grounds.

II.

In his statement of the case, Respondent makes the misleading statement that during the trial the Justice "...then adjudicated Petitioner guilty of contempt on the grounds set forth in the certificate." (Resp. p. 6). In fact, the record shows that during the trial when the actual contempt adjudication was made, the Justice based his finding solely on the ground of Petitioner's last statement to the jury: "You'll have to bring a verdict for the Plaintiff, but I hope that you will strike a blow for the jury system and for decency by coming in with a verdict for nothing." (Pet. p. D-16). No other grounds were stated until the hearing for sentencing and the issuance of the Certificate more than a week later.

Respondent states that Petitioner is "isolating one statement made by him - his

request that the jury 'strike a blow for the jury system and for decency by coming in with a verdict for nothing'..." and not assessing the "totality" of his conduct as did the Court below. (Resp. p. 14). But this single statement is the only ground upon which the trial justice relied when the actual adjudication was made. (see above).

In its Order Denying Rehearing, The Court below recognized this by stating that its finding was based on conduct which "occured only after the presiding Justice had clarified to Appellant the significance of his granting of Plaintiff's motion for a directed verdict." (Pet. p. C-1).(emphasis added). The only such conduct stated in the Certificate is precisely the one statement which Respondent claims Petitioner is "isolating."

This highlights Petitioner's claim of unconstitutional vagueness. The Court below stated that its finding was based on one sentence spoken by Petitioner (see above). Then it judged this one sentence by assessing "...the totality of Petitioner's conduct as

set forth in the contempt certificate..." (Resp. p. 15). It went even further by assessing conduct found in the record but not in the Certificate. (See note 2 of the Opinion of the Court below - Pet. p. B-3). Thus the stated contemptuous act was judged by the "totality" of Petitioner's conduct; the only limit being the record of the case. Such a standard is unconstitutionally vague.

If an act of an attorney is to be judged by all his other acts at trial, there can be no certain standard by which the original act can be judged. The considerations are endless and unanswerable because of their multiplicity. In this sense Petitioner claims that this "totality" standard is unconstitutionally vague; that it denies due process. It denies Petitioner (and every other attorney) the ability to predict the consequences of any individual act. It denies him the right of an adequate appeal record since he cannot know the extent of the acts considered relevant.

Respondent argues that Petitioner cannot raise the issue of vagueness because "...it was never raised in the state court proceedings." (Resp. p. 13). This is wrong on two grounds:

1. Vagueness is the obverse of Petitioner's claim in the Court below that "the certificate ... is fatally deficient in its statement of the requisite basic facts." (Pet. p. 5). To claim one is to claim the other.
2. The issue of vagueness raised by this "totality" standard did not exist until the Court below ruled in the instant case. That opinion created new law by extending the standard by which contempt is judged in Maine. Petitioner's first opportunity to question this was after the Court below so ruled.

Conclusion

For the foregoing reasons and for the reasons set forth in the Petition, it is

respectfully submitted that the Petition for a writ of Certiorari be granted.

Respectfully submitted,

Joseph Steinberger
Waldoboro
Maine 04572
Petitioner

Supreme Court, U. S.
FILED
NOV 3 1978
MICHAEL RODAK, JR., CLERK

IN THE

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No. 78-578

IN RE JOSEPH STEINBERGER

THE LINCOLN COUNTY BAR ASSOCIATION

AMICUS CURIAE

BRIEF OF AMICUS CURIAE IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

STANLEY R. TUPPER
102 Townsend Avenue
Boothbay Harbor, Maine
AMICUS CURIAE

IN THE

SUPREME COURT OF THE UNITED STATES

October term, 1978

No. 78-578

IN RE JOSEPH STEINBERGER

THE LINCOLN COUNTY BAR ASSOCIATION

AMICUS CURIAE

BRIEF OF AMICUS CURIAE IN SUPPORT
OF A PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MAINE

The Lincoln County Bar Association is a voluntary organization of all attorneys in Lincoln County, Maine. Petitioner Joseph Steinberger, also a member, was judged guilty of criminal contempt in the Superior Court of Lincoln County.

The Association has an interest in protecting the rights of all of its members

while engaged in the practice of law. In particular, it has an interest in protecting its members from arbitrary punishment when they are representing clients in court.

The ability of all association members to fairly and strenuously represent clients before juries has been threatened by the decision in the instant case. The standard of contempt set here is so vague that members cannot know when conduct which appears innocent will be found summarily contemptuous. The record is not conclusive that Petitioner Steinberger was acting in a contemptuous manner or that he was obstructing the court in its judicial functions. The standard set on review seems to accept the rule that if the trial justice feels insulted, then a contempt has been committed. Members are threatened because of the lack of objectivity of this standard; because of the absence of a meaningful review. A constant threat of unpredictable judicial punishment has been placed on member attorneys while practicing in court.

This damages not only the attorneys' professional practice, but also infringes on their clients' right to trial by jury; to be represented by attorneys who are free from fear of arbitrary and summary contempt citations.

CONCLUSION

A predictable and recognizable standard of contempt is needed for the proper and just functioning of the judicial system. The standard for contempt in this case is unconstitutionally vague. The Association respectfully submits that this Court grant the Petition for Certiorari.

Respectfully submitted,

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Boothbay Harbor, Maine
Counsel for the Lincoln
County Bar Association
Amicus Curiae